

Products Liability Law Daily Wrap Up, TOP STORY—WARNINGS ISSUES—10thCir.: \$3.5M jury verdict against rock crushing machine maker overturned for lack of evidence, (Aug. 26, 2015)

By Pamela C. Maloney, J.D.

Finding no evidence that a construction worker would have read or heeded a different warning regarding the risk of injury associated with clearing jams from a rock crushing machine, the U.S. Court of Appeals for the Tenth Circuit overturned a jury award of more than \$3.5 million against the manufacturer of the machine. Similarly, there was no evidence to support the worker's claim that a toggle plate component in the machine contained a manufacturing defect (*Kirkbride v. Terex USA, LLC*, August 25, 2015, Hartz, H.).

Background. Larry Kirkbride, a front-end loader operator, was injured while attempting to dislodge a 19-inch metal "ripper tooth" that had become wedged in a gap between the jaws of the machine as the tooth was being used to break up a large boulder that had become stuck in the machine's crushing chamber. As Kirkbride began cutting the tooth with an acetylene torch, the tooth shot out of the jaws of the machine, striking Kirkbride's neck and jaw.

Kirkbride filed a lawsuit in Utah state court against Terex, whose predecessor had manufactured the machine. The complaint stated counts for negligent manufacturing and design, negligence in providing inadequate warnings and instructions, strict products liability for manufacturing and design defects and for failure to warn, and for breach of express and implied warranties. The suit was removed to federal court and, after the close of the evidence, Kirkbride withdrew his express warranty and negligence claims. The jury found Terex liable on Kirkbride's remaining claims and awarded him damages of over \$3.5 million. The manufacturer appealed.

Failure to warn. The worker had argued that the warning was inadequate because it was not accompanied by instructions on how to remove uncrushable material from the crusher. The court determined that it was unnecessary to decide whether the warning was adequate because there was no evidence that a better warning would have prevented the worker's injury. The manufacturer's safety manual warned workers to avoid doing exactly what the worker had been doing by exposing his head to metal stuck in the jaws. However, there was no evidence that the worker had read the machine's safety manual or its operation and maintenance (O&M) manual.

The worker countered that the construction company's maintenance staff would refer to these manuals when performing repairs and that these manuals were supposed to be part of the training for workers assigned to operate the machine. Thus, the jury reasonably could have inferred that had the manufacturer provided adequate instructions and warning for what to do when a jam occurred, other employees working on the crusher would have been trained in those procedures. The worker stated that he would have followed the instructions and would not have been injured. Once again, the court found no evidence to support this argument. There were four workers on the scene at the time of the accident and there was no evidence that any of them had read the warnings that had been given. Nor was there evidence that any of the workers present had been trained on clearing a crusher jam by anyone who had read the manuals. In addition, there was no evidence that any of the workers present had instructed the worker that he should be very cautious while removing uncrushable material from a jam, including by keeping his head clear—a warning that had been in the manual.

Heeding presumption. The court also rejected the worker's argument that he had proven causation using the heeding presumption. The doctrine provides that in those cases in which it could not be demonstrated what the plaintiff would have done had he or she been adequately warned, the plaintiff should be afforded a rebuttable presumption that had an adequate warning been provided, it would have been followed. In this case, the manufacturer conclusively rebutted that presumption because not only had the worker not read the warning that was in the manual, he expressed a negative view of all manuals.

Manufacturing defect claim. The worker alleged that the toggle plate had been defectively manufactured in that it was thicker than what was called for in the design specifications. He further alleged that this defect caused the plate not to break. An essential element of his proof of causation, therefore, must be proof that a properly manufactured plate would have broken under the circumstances of his accident. The court agreed with the

manufacturer that there was insufficient proof that a non-defective plate would have broken. Acknowledging that the defective plate would be harder to break, the court noted that the force asserted by the machine would be insufficient to break either a defective or a non-defective plate; thus, the defect would not be a cause of the jam. It also was not obvious that a properly manufactured plate would always prevent a jam and, in fact, the safety manual warning about jammed tramp iron implied that the plate would not always break.

The court also referred to testimony by one of the worker's experts who admitted that he had not tested a non-defective plate with the same thickness as the allegedly defective plate. The court concluded that the expert had no opinion as to whether a properly manufactured plate would have been broken and that, in the absence of testing or calculations, the expert had no basis for such an opinion. Thus, there was no evidence to support the jury's finding of liability on the manufacturing defect claim.

Implied warranty claim. Turning to the worker's implied warranty claim, the court clarified that for purposes of a tort claim for breach of the implied warranty of merchantability, Utah law provides that the warranty is breached only if the plaintiff establishes the elements of a strict products liability claim for defective manufacture, defective design, or failure to warn. Because the worker did not establish either a failure to warn or a product defect claim, his implied warranty claim gave him no additional ground for affirming the jury award. Thus, the court also reversed the finding on this claim.

The case is No. 14-4023.

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Companies: Terex USA, LLC

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